NO. 44139-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES J. O'HAGAN,

Appellants,

vs.

JDH CRANBERRIES LLC, et al

Respondents.

BRIEF OF RESPONDENT, JDH CRANBERRIES, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

Respondent, JDH Cranberries, LLC, (hereinafter "JDH") asks this Court to affirm the trial court's summary judgment decision in its favor below. In this appeal, Appellant James O'Hagan raises the same unfounded claims that have been disposed of by the courts on numerous prior occasions.

Orders have now been entered by the United States Bankruptcy Court, the Superior Court of Pacific County, and the Court of Appeals holding that Mr. O'Hagan has no basis for asserting a lien or other possessory interest against the real property owned by JDH that is the subject of this action. Furthermore, the Bankruptcy Court and trial court entered orders holding Mr. O'Hagan in contempt for being a vexatious litigant and for bringing frivolous claims. Orders have also been entered by both of these courts prohibiting Mr. O'Hagan from filing any claims related to JDH's property without first seeking permission from the court by ex parte motion and supported by a declaration asserting that the matters raised are not frivolous or made in bad faith.

In this case, Mr. O'Hagan subverted these orders by recording an "Affidavit of Hostile Possessory Interest" against JDH's property, rather than seeking leave of the court and filing a lawsuit. JDH responded by filing a lawsuit for quiet title and ejectment. The case was resolved when the trial

court granted JDH's motion for summary judgment holding that Mr. O'Hagan's actions were barred by res judicata and collateral estoppel, harassing and frivolous in nature, not grounded in fact or warranted by law, and were made in bad faith. Sanctions were entered against Mr. O'Hagan, title was quieted in favor of JDH, and Mr. O'Hagan was enjoined from entering upon the property.

II. COUNTER-STATEMENT OF THE ISSUES

1. Did the trial court correctly grant summary judgment in favor of JDH on its claims for quiet title and ejectment where (1) O'Hagan has no legal or equitable claim to title of JDH's property; and (2) res judicata and collateral estoppel bar O'Hagan from relitigating these claims?

2. Whether the Court should award attorney fees to JDH pursuant to RAP 18.1 where attorney fees were awarded by the trial court based upon a finding of bad faith against Mr. O'Hagan.

III. STATEMENT OF THE CASE

JDH holds legal title to the property that is the subject of this lawsuit which consists of a cranberry farm located in Grayland, Washington. CP 1085-86. JDH acquired title on February 24, 2015. *Id.* Approximately fifteen years prior, Mr. O'Hagan had obtained a judgment against the previous owner of the property, Kenyon Kelley, and recorded that judgment as a lien against the property. Ultimately, Mr. Kelley filed for bankruptcy and Mr. O'Hagan's lien was voided by order of the Bankruptcy Court on September 21, 2001. CP 1114-16.

Following a series of unsuccessful attempts to overturn the bankruptcy court's ruling, Mr. O'Hagan initiated a proceeding in Superior Court once again attempting to assert his lien against the property. This case was appealed to Division II in *O'Hagan v. Nw. Farm Credit Servs.*, No. 38676-3-II, (Nov. 16, 2010)[1] and this Court ruled that Mr. O'Hagan's claims were barred by collateral estoppel and res judicata.

Despite this Court's ruling, Mr. O'Hagan continued to pursue his claims in both Bankruptcy Court and the Superior Court. Orders were eventually entered in 2012 by both courts denying Mr. O'Hagan's requests for relief. CP 1121-26, 1128-33, 1135-40, 1142-47. Due to Mr. O'Hagan's nonstop efforts to persist in his frivolous claims, both courts granted the extraordinary relief of requiring Mr. O'Hagan to seek leave of the Court before filing any new pleadings regarding JDH's property, and enjoining the clerk's office from accepting any such filings absent court approval. *Id.*

Mr. O'Hagan was still undeterred and in January of 2015, he recorded an "Affidavit of Hostile Possessory Interest" against JDH's property which in turn forced JDH to file the present lawsuit. CP 1088-1106. The trial court granted summary judgment in favor of JDH and entered an order ejecting Mr. O'Hagan from the property and quieting title

[1] A copy of this opinion is attached hereto in the appendix.

in favor of JDH. CP 1168-73. The Court found that Mr. O'Hagan's act of recording the Affidavit of Hostile Possessory Interest was done in violation of the order entered by this Court on January 15, 2013, in Case Number 12-4-00008-4, which enjoined Defendant from taking "further actions which attempt to assert any dominion or control" over the subject property, and sanctions for contempt were imposed. *Id.* The trial court further found that sanctions were appropriate because Mr. O'Hagan's actions were taken in bad faith. *Id.*

IV. ARGUMENT

1. TITLE TO THE SUBJECT PROPERTY WAS PROPERLY QUIETED IN FAVOR OF JDH.

RCW 7.28.010 codifies the equitable action to quiet title and ejectment by providing that "[a]ny person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same...against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title." O'Hagan clouded title to the subject property by asserting a claim of adverse possession and alternatively asserting that a judgment lien exists. CP 1088-91. O'Hagan also threatened to harvest cranberries from the property, thereby depriving JDH of possession. *Id.*

A. *Plaintiff's claim to title.*

Under Washington law "[e]very conveyance of real estate or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed". RCW 64.04.010. The title record definitively establishes that JDH is the owner of the subject property. The following conveyances by deed occurred since 1989:

DATE	GRANTOR	GRANTEE
4/3/89	Robert Abshire and Marilyn Abshire	Kenyon Kelley and Stella Jean Kelley
3/30/00	Stella Jean Kelley	Kenyon Kelley
5/16/14	Kenyon Kelley (through bankruptcy trustee)	Crimson Bogs LLC
3/10/15	Crimson Bogs LLC	JDH Cranberries, LLC

Each of these deeds was properly recorded with the Pacific County Auditor's Office. CP 1076-86. James O'Hagan never held title to the subject property during this time. There is no evidence that he was ever granted a deed to the subject property. However, even if he was granted a deed to the subject property then it is void because it was never recorded and JDH Cranberries is a subsequent purchaser in good faith. *See* RCW 65.08.070 ("Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his or her heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded."). Thus, the title record definitively establishes JDH lawfully

holds paramount title to the subject property.

B. *O'Hagan's adverse possession claim was frivolous.*

In order to establish a claim of adverse possession, the possession must be: 1) exclusive, 2) actual and uninterrupted, 3) open and notorious and 4) hostile and under a claim of right made in good faith for a period of 10 years. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984); RCW 7.28.010. Regardless of whether any of these elements can be satisfied, neither Mr. O'Hagan nor anyone else could have possibly possessed the subject property for the required 10 year period. The court order entered under Case Number 12-4-00008-4 plainly states that the subject property was owned by the bankruptcy estate of Kenyon Kelley as of January 15, 2013. CP 1142-47. Even if O'Hagan began adversely possessing the subject property the day after this order was entered, he would still have less than 3 years of possession time at the time the trial court action was filed. Furthermore, the same court order enjoined O'Hagan from taking "further actions which attempt to assert any dominion or control" over JDH's property, and any attempt to adversely possess the property would be in direct violation of this order. *Id.* Therefore, any adverse possession claim must fail.

2. RES JUDICATA AND COLLATERAL ESTOPPEL BAR O'HAGAN FROM ASSERTING A JUDGMENT LIEN AGAINST JDH'S PROPERTY.

The Court of Appeals has already determined that res judicata and collateral estoppel bar O'Hagan from relitigating whether he has an enforceable lien against the subject property. *See O'Hagan*, 158 Wn. App. 1040, No. 38676-3-II (Nov. 16, 2010).

A. *Res judicata bars O'Hagan from asserting a judgment lien against the subject property.*

Res judicata refers to the preclusive effect of judgments, including the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). It is designed to prevent relitigation of already determined causes and curtail multiplicity of actions and harassment in the courts. *Id.* Under the doctrine of res judicata, or claim preclusion, a prior judgment will bar litigation of a subsequent claim if the prior judgment has a concurrence of identity with the subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made. *Id.*

The Court of Appeals, in reviewing these criteria with respect to O'Hagan's claim that he had an enforceable lien on the subject property, stated as follows:

> Here, the foreclosure action involved the same subject matter, the superiority of FCS's interest in the Kelley property, satisfying the first factor. Also, an action where O'Hagan attempted to foreclose on a superior lien would necessarily be under the same cause of action, satisfying the second factor. Furthermore, the parties to the foreclosure action, FCS and O'Hagan, are the same here, satisfying the third factor. The fourth factor requires parties to be bound by the action, either as original parties, or as parties in privity with them. 14A Karl B. Tegland, Washington Practice: Civil Procedure § 35:27, at 533–34 (2d.ed.2009). The fact that O'Hagan and FCS were the original parties satisfies the fourth factor. Because all four factors are met, res judicata bars O'Hagan from relitigating the superiority of his lien on the Kelley property, and the order denying writ of execution erroneously permitted O'Hagan to relitigate the issue.

O'Hagan, No. 38676-3-II at *4. The court went on to state as follows:

> Here, **res judicata bars O'Hagan from relitigating the superiority of any lien on the Kelley property**. Because the bankruptcy court voided O'Hagan's lien, he lacks an enforceable lien to execute on the Kelley Property.

Id. (emphasis added).

Thus, the issue of whether O'Hagan has an enforceable lien on the subject property has already been determined and res judicata precludes him from presenting this argument again.

B. *Collateral estoppel bars O'Hagan from asserting a judgment lien against the subject property.*

Collateral estoppel, or issue preclusion, requires: (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the

prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied." *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 792, 193 P.3d 1077, 1089 (2008). "In addition, the issue to be precluded must have been actually litigated and necessarily determined in the prior action." *Id.*

Here, the Court of Appeals already considered whether collateral estoppel bars O'Hagan from asserting that he has a valid lien on the subject property:

> **Collateral estoppel bars O'Hagan's claims to a valid lien on the Kelley property**. The instant case and the bankruptcy case involve the same issue, the validity of O'Hagan's lien on the Kelley property, satisfying the first factor. Also, the bankruptcy case came to a final judgment on the merits, in which the bankruptcy court voided O'Hagan's lien. The fact that O'Hagan unsuccessfully attempted to overturn the order to void liens three times shows the order's finality, satisfying the second factor. O'Hagan was a party to the action, satisfying the third factor. And it is not unjust to prevent O'Hagan from attempting to execute an already-voided lien, satisfying the fourth factor. As to the final factor, the record and briefs before us make it clear that this issue was actually litigated and necessarily decided. As all of the factors have been met, the doctrine of collateral estoppel precludes O'Hagan from relitigating this issue.

O'Hagan, 158 Wn. App. 1040, No. 38676-3-II at *3 (emphasis added).

3. ATTORNEY FEES SHOULD BE AWARDED TO JDH AS O'HAGAN'S APPEAL IS NOT WELL GROUNDED IN FACT OR SUPPORTED BY LAW AND IS MADE IN BAD FAITH.

RCW 4.84.185 provides that the prevailing party is entitled to receive expenses for opposing a frivolous action or defense:

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause.

Likewise, Civil Rule 11 permits reasonable attorney fees and costs incurred because of a bad faith filing of pleadings for an improper purpose or by filing pleadings that are not grounded in fact or warranted by law. *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707, 710 (2004). The purpose of the rule is to deter baseless filings and curb abuses of the judicial system. *Id.* And a filing is baseless if it is not well grounded in fact, or not warranted by existing law or a good faith argument for altering existing law. *Id.* The burden is on the movant to justify the request for sanctions.

Id. at 754-55. CR 11 sanctions have a potential chilling effect. *Id.* And so the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success. *Id.* The fact that a complaint does not prevail on its merits is not enough. *Id.*

A court also has the inherent authority to impose sanctions. *State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d 1058, 1061 (2000). A trial court's inherent authority to sanction litigation conduct is properly invoked upon a finding of bad faith. *Id.*; *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). A finding of "inappropriate and improper" is tantamount to a finding of bad faith. *State v. S.H.*, 102 Wn. App. at 475 (internal citations omitted). The court's inherent power to sanction is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers*, 501 U.S. at 43. Sanctions may be appropriate if an act affects "the integrity of the court and, [if] left unchecked, would encourage future abuses. *State v. S.H.*, 102 Wn. App. at 475 (internal citations omitted); *see also Chambers*, 501 U.S. at 46 (explaining that sanctions are appropriate if the "very temple of justice has been defiled" by the sanctioned party's conduct).

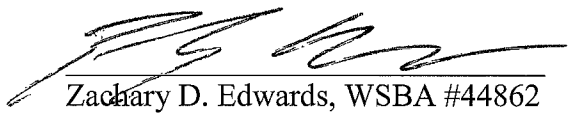
Furthermore, RAP 18.1 permits the recovery of reasonable attorney fees if applicable law grants the party the right to such fees. Mr. O'Hagan's

appeal, as well as his arguments to the trial court, are not well grounded in fact, and are not warranted by existing law.

V. CONCLUSION

For these reasons, JDH respectfully requests that this Court affirm the trial court's decision and award reasonable attorney fees to JDH pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 16th day of December, 2016.



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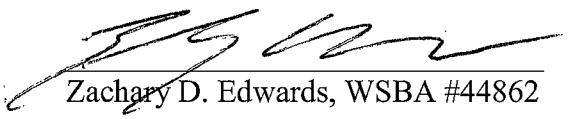
CERTIFICATE OF SERVICE

The undersigned hereby declares under penalty of perjury of the laws of the State of Washington that on the date set forth below I caused the foregoing document to be served on the following parties in the manner indicated below:

James O'Hagan 2298 Cranberry Road Grayland, WA 98547	[**X**] U.S. Mail sent postage prepaid [ ] Fax [ ] Electronic Mail
Kirsten M. Schmpff Washington State Bar Association 1325 Fourth Ave – Suite 600 Seattle, WA 98101-2539 kirstens@wsba.org	[ ] U.S. Mail sent postage prepaid [ ] Fax [**X**] Electronic Mail

DATED: December 20, 2016.

HAGEN BATES & EDWARDS P.S.
Attorneys for JDH Cranberries, LLC



Zachary D. Edwards, WSBA #44862

APPENDIX TO
BRIEF OF RESPONDENT
JDH CRANBERRIES, LLC

O'Hagan v. Nw. Farm Credit Servs., No. 38676-3-II (Nov. 16, 2010)

158 Wash.App. 1040

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.

James O'HAGAN, Respondent,
v.
NORTHWEST FARM CREDIT SERVICES, Appellant.

No. 38676–3–II.
|
Nov. 16, 2010.

Appeal from Pacific County Superior Court; Honorable Douglas Edward Goelz, J.

Attorneys and Law Firms

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UNPUBLISHED OPINION

WORSWICK, A.C.J.

***1** James O'Hagan won a judgment against his neighbor, Kenyon Kelley, who then filed for bankruptcy. After the bankruptcy court issued an order voiding O'Hagan's lien against Kelley's property, O'Hagan continued to try to execute the lien. Northwest Farm Credit Services (FCS), the mortgage holder, appeals three trial court decisions ruling that O'Hagan may continue his efforts to execute this judicial lien. We reverse and remand.

FACTS

In 1994, O'Hagan brought a civil suit over water rights against his neighbor and fellow cranberry farmer, Kenyon Kelley. In 1996, FCS refinanced a mortgage on Kelley's cranberry farm (the Kelley property), giving FCS an interest in the property. On June 30, 2000, the superior court awarded O'Hagan a judgment against Kelley for approximately $200,000. O'Hagan obtained a judicial lien on the Kelley property pursuant to this judgment.

On July 14, Kelley filed for bankruptcy in the United States Bankruptcy Court for the Western District of Washington. On September 21, 2001, the bankruptcy court issued an order to void liens and abandon property (order to void liens) that specifically voided O'Hagan's judicial lien on the Kelley property. O'Hagan unsuccessfully attempted to overturn this order in the bankruptcy court three times.

Though the bankruptcy court voided O'Hagan's lien on the Kelley property, it denied Kelley's discharge in bankruptcy on March 26, 2002. As such, O'Hagan's June 30, 2000 judgment remains in effect against Kelley personally, though it no longer attaches to the Kelley property.

On April 8, 2002, in superior court, FCS obtained a judgment and decree of foreclosure on the Kelley property. The trial court specifically ruled that all of Kelley's and O'Hagan's interests in the Kelley property were subordinate to FCS's judgment of foreclosure. O'Hagan subsequently moved for reconsideration, which the superior court denied. As of the date of oral argument in this appeal, FCS had not sold the Kelley property pursuant to its foreclosure judgment, citing environmental concerns, the property's value, and O'Hagan's litigiousness.

O'Hagan brought a separate adversary proceeding against FCS in bankruptcy court, alleging that FCS improperly failed to sell the Kelley property after foreclosure, breaching a duty of care to O'Hagan. O'Hagan further alleged that the 1996 refinance of the Kelley property was an invalid fraudulent transfer.[1] The bankruptcy court granted summary judgment against O'Hagan on both claims. The court then dismissed the adversary proceeding on December 22, 2005. O'Hagan moved to reopen the proceeding, which the court denied in February 2007.

On May 7, 2008, in Pacific County Superior Court, O'Hagan served FCS with a summons under RCW 6.32.270.[2] O'Hagan also moved to reconsider FCS's 2002 foreclosure judgment. FCS filed a motion to quash the summons on July 15. On September 12, the superior court issued a memorandum opinion ruling that O'Hagan's attempt to overturn FCS's foreclosure judgment was

barred by res judicata and collateral estoppel but that O'Hagan was not barred from foreclosing on the Kelley property.[3] The court further ruled that nothing in the Bankruptcy Code forbade O'Hagan from foreclosing on the Kelley property and that such a prohibition would be contrary to RCW 6.13.110(3)[4] and *Robin L. Miller Construction Co., Inc. v. Coltran,* 110 Wash.App. 883, 43 P.3d 67 (2002). On October 9, the superior court issued a supplemental order finding that further pleadings by O'Hagan against FCS would constitute an abuse of process. But the supplemental order stated, "[T]his order shall not be interpreted to limit, in any way, [O'Hagan's] right to foreclose on [the Kelley property] or to obtain a writ of execution on [the Kelley property]." Clerk's Papers (CP) at 307.

***2** On October 13, in the same action as the RCW 6.32.270 summons, O'Hagan filed a motion entitled "Plaintiffs Motion by Declaration for Action on Writ of Execution, Vacation of Orders, Change of Venue & Entry of Judgment Derived from Judgment Creditor's Response to [FCS] Memorandum in Limited Opposition for Turnover Order on Judgment Debtors [sic] Property." CP at 308. In response to this motion, the superior court issued an order denying writ of execution on November 20. But this order also stated that O'Hagan could litigate the issue of "any alleged superior lien" on the Kelley property if he complied with RCW 6.13.090 through RCW 6.13.190.[5] CP at 404. FCS sought discretionary review of the order denying writ of execution, which we granted.[6]

ANALYSIS

I. Preclusive Effect of Federal Bankruptcy Orders

FCS argues that O'Hagan's attempts to execute his judgment against the Kelley property are barred by (1) the full faith and credit clause of the United States Constitution, (2) collateral estoppel, and by (3) res judicata. FCS claims the memorandum opinion, the supplemental order, and the order denying writ of execution (collectively, the contested orders) are invalid on these bases.

A. Full Faith and Credit

FCS asserts that the contested orders are invalid because they fail to give full faith and credit to the bankruptcy court's order to void liens, its ruling in the bankruptcy adversary proceeding, and the superior court's judgment and decree of foreclosure. We disagree.

We review constitutional issues de novo. *Citizens Protecting Res.s v. Yakima County,* 152 Wash.App. 914, 919, 219 P.3d 730 (2009). Article IV of the United States Constitution requires the states to give full faith and credit to every other state's judicial proceedings. U.S. Const. art. IV, § 1. It also authorizes Congress to prescribe the means of proving that a judgment is entitled to such credit. U.S. Const. art. IV, § 1. Congress exercised this authority in passing 28 U.S.C. § 1738 (2006), which sets forth the requirements for a judgment to receive full faith and credit. But neither the full faith and credit clause nor 28 U.S.C. § 1738 apply to judgments by federal courts. *Semtek Int'l Inc. v. Lockheed Martin Corp.,* 531 U.S. 497, 506–07, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001). Because they are federal court orders, neither of the bankruptcy court orders implicate the full faith and credit clause. The foreclosure judgment also does not implicate the full faith and credit clause, because it is a Washington judgment, not another state's judgment. Therefore, FCS's argument that we should reverse the contested orders under the full faith and credit clause fails. This does not mean, however, that the bankruptcy court orders are ineffective.

B. Collateral Estoppel

FCS also asserts that because the bankruptcy court voided O'Hagan's lien on the Kelley property, collateral estoppel precludes O'Hagan from relitigating the lien's validity. We review de novo whether collateral estoppel bars an action. *City of Walla Walla v. $401,333.44,* 150 Wash.App. 360, 365, 208 P.3d 574 (2009).

***3** The bankruptcy court voided O'Hagan's lien under Section 522(f)(1) of the Bankruptcy Code. This section provides that a debtor in bankruptcy may avoid judicial liens to the extent that such liens impair the debtor's exemptions in property. 11 U.S.C. § 522(f)(1) (2006). A judicial lien impairs the debtor's exemptions when the debtor's interest in the liened property is less than the sum

of any exemption, plus all liens on the property. 11 U.S.C. § 522(f)(2). In the order to void liens, the bankruptcy court determined that O'Hagan's judicial lien impaired Kelley's homestead exemption, and it voided the lien on that basis. When the court voids a lien under Section 522, the underlying judgment remains in place, but the judgment creditor can no longer execute it against the property that it originally attached to. *In re Ewiak,* 75 B.R. 211, 213 (Bankr.W.D.Pa.1987).

' "When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues is barred by collateral estoppel." ' *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.,* 164 Wash.2d 768, 792, 193 P.3d 1077 (2008) (citations omitted) (quoting *Hilltop Terrace Homeowner's Ass'n v. Island County,* 126 Wash.2d at 22, 31, 891 P.2d 29 (1995)). Collateral estoppel, or issue preclusion, requires

> "(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied."
>
> "In addition, the issue to be precluded must have been actually litigated and necessarily determined in the prior action."

City of Arlington, 164 Wash.2d at 792, 193 P.3d 1077 (quoting *Shoemaker v. City of Bremerton,* 109 Wash.2d 504, 507–08, 745 P.2d 858 (1987)).

Collateral estoppel bars O'Hagan's claims to a valid lien on the Kelley property. The instant case and the bankruptcy case involve the same issue, the validity of O'Hagan's lien on the Kelley property, satisfying the first factor. Also, the bankruptcy case came to a final judgment on the merits, in which the bankruptcy court voided O'Hagan's lien. The fact that O'Hagan unsuccessfully attempted to overturn the order to void liens three times shows the order's finality, satisfying the second factor. O'Hagan was a party to the action, satisfying the third factor. And it is not unjust to prevent O'Hagan from attempting to execute an already-voided lien, satisfying the fourth factor.

As to the final factor, the record and briefs before us make it clear that this issue was actually litigated and necessarily decided. As all of the factors have been met, the doctrine of collateral estoppel precludes O'Hagan from relitigating this issue. All three of the contested superior court orders are therefore in error under the doctrine of collateral estoppel because all three orders permit O'Hagan to relitigate the validity of his lien on the Kelley property in spite of the bankruptcy court's order to void liens. Accordingly, we reverse the contested orders to the extent that they allow O'Hagan to execute his lien on the Kelley property or to relitigate its validity.

II. Res Judicata

***4** FCS also argues that the doctrine of res judicata bars O'Hagan from litigating the superiority of his lien on the Kelley property. FCS asserts that the order denying writ of execution was in error because it failed to give res judicata effect to FCS's foreclosure judgment. The order denying writ of execution permits O'Hagan to litigate the issue of "any alleged superior lien" on the Kelley property, while the foreclosure judgment held O'Hagan's interest inferior to FCS's. Br. of Appellant at 23; CP at 404, 131. We review de novo whether res judicata bars an action. *Williams v. Leone & Keeble, Inc.,* 152 Wash.App. 150, 153, 216 P.3d 446 (2009). In Washington, under the doctrine of res judicata, or claim preclusion

> a prior judgment will bar litigation of a subsequent claim if the prior judgment has "a concurrence of identity with [the] subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made."

In re Election Contest Filed by Coday, 156 Wash.2d 485, 500–01, 130 P.3d 809 (2006).

Here, the foreclosure action involved the same subject matter, the superiority of FCS's interest in the Kelley property, satisfying the first factor. Also, an action where O'Hagan attempted to foreclose on a superior lien would necessarily be under the same cause of action, satisfying the second factor. Furthermore, the parties to the foreclosure action, FCS and O'Hagan, are the same here, satisfying the third factor. The fourth factor requires parties to be bound by the action, either as original parties, or as parties in privity with them. 14A Karl B. Tegland, Washington Practice: Civil Procedure § 35:27, at 533–34 (2d.ed.2009). The fact that O'Hagan

and FCS were the original parties satisfies the fourth factor. Because all four factors are met, res judicata bars O'Hagan from relitigating the superiority of his lien on the Kelley property, and the order denying writ of execution erroneously permitted O'Hagan to relitigate the issue.

O'Hagan counters that under *Miller Construction,* 110 Wash.App. at 883, 43 P.3d 67, res judicata does not bar him from litigating the superiority of his lien. The superior court agreed with this argument in its memorandum opinion. The application of precedent is a question of law, reviewed de novo. *See Dreiling v. Jain,* 151 Wash.2d 900, 907–08, 93 P.3d 861 (2004). *Miller Construction* holds that when a judgment creditor attempts to execute a judgment and the execution is quashed, res judicata does not bar subsequent execution attempts. 110 Wash.App. at 892, 43 P.3d 67. The *Miller Construction* court reasoned that because an execution proceeding is not a cause of action, but rather an attempt to enforce a judgment, res judicata does not apply. 110 Wash.App. at 892, 43 P.3d 67. *Miller Construction* did *not* hold that, simply by labeling an action as an execution action, one may relitigate whatever issues one wants. Here, res judicata bars O'Hagan from relitigating the superiority of any lien on the Kelley property. Because the bankruptcy court voided O'Hagan's lien, he lacks an enforceable lien to execute on the Kelley Property. *Miller Construction* does not allow a judgment creditor to enforce a voided lien and does not strip FCS's foreclosure judgment of its res judicata effect. As such, we reverse the order denying writ of execution insofar as it allows O'Hagan to claim a superior interest in the Kelley property.

III. O'Hagan's Right to Execute Judgment

***5** O'Hagan also asserts that the motion below was a valid execution action to determine the value of Kelley's and FCS's interests in the Kelley property under RCW 6.32.270. O'Hagan asserts that he may use this statute to "prove fraudulent intent on the part of [counsel for FCS] and FCS." Br. of Resp't at 5. We review questions of statutory interpretation de novo. *Thompson v. Hanson,* 167 Wash.2d 414, 419, 219 P.3d 659 (2009). RCW 6.32.270 provides that a court may adjudicate a judgment debtor's interest in property "in any supplemental proceeding" to an execution action. Since O'Hagan cannot bring a valid execution action against the Kelley property, he logically cannot bring a proceeding supplemental to execution either. Moreover, nothing in the text of RCW 6.32.270 authorizes any party to litigate the issue of fraud. Because RCW 6.32.270 does not support O'Hagan's right to bring the action, this claim fails.

IV. O'Hagan's Arguments and Motion

O'Hagan asserts a variety of arguments in his brief in two sections entitled "Counterstatement to Assiginements [sic] of Error" and "Counter Statement to Issues Presented for Review." Br. of Resp't at 4, 16. These sections assert new issues for this court to consider, many of which are not supported by the record before us. All of O'Hagan's claims have been dismissed with prejudice by two separate courts, and there are no pending appeals. O'Hagan has not filed a notice of appeal or a notice for discretionary review in this case as RAP 5.1(d) requires. Because O'Hagan has not filed a notice of appeal or a notice for discretionary review, his "counter issues" are not appropriately before us and we do not consider them.

O'Hagan also requests that we rule on a motion and a subpoena attached to his brief. O'Hagan purports to bring the motion under RCW 2.44.030, "Production of authority to act." This statute allows a court, on showing of reasonable grounds, to require an attorney to prove the authority under which he appears for a client. RCW 2.44.030. O'Hagan's motion requests that we, first of all, determine whether an RCW 2.44.030 motion can be brought before us. We hold that O'Hagan cannot bring such a motion before this court. We are a court of review; we do not conduct courtroom proceedings such as those contemplated by RCW 2.44.030. *See State v. We,* 138 Wash.App. 716, 723, 158 P.3d 1238 (2007); RAP 1.1(a); RAP 2.5(a). And O'Hagan's motion was not heard at the trial court, so there is no decision on the record for us to review. Furthermore, the motion's contents are improper. In his motion O'Hagan asks us to determine, based on facts not in the record, whether the attached subpoena is warranted. The attached subpoena commands the manager of FCS to produce documents and to appear before this court and give testimony. RCW 2.44.030 authorizes a court to require proof of authority from an attorney, not to consider the propriety of a subpoena, so this statute is an invalid basis for O'Hagan's motion. Moreover, nothing in the Rules of Appellate Procedure authorizes us to subpoena witnesses or take testimony. We hold that the motion and subpoena are

improperly before us and that their contents are outside of our jurisdiction. Consequently, we do not consider O'Hagan's attached motion and subpoena.

IV. Sanctions

***6** FCS requests that we sanction O'Hagan for filing an improper brief. FCS asserts that sanctions may include striking or disregarding portions of a brief that do not conform to the rules, or monetary sanctions. Although we decline to consider such of O'Hagan's arguments that are improperly before this court, we do so because of procedural and jurisdictional defects in these arguments, not as a sanction against O'Hagan. We decline to impose monetary sanctions against O'Hagan.

We reverse the contested orders to the extent that they permit O'Hagan to claim a valid lien on the Kelley property or to execute his judgment against said property, and we remand for further proceedings consistent with this opinion.

Reverse and remand.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: ARMSTRONG and LAU, JJ.

All Citations

Not Reported in P.3d, 158 Wash.App. 1040, 2010 WL 4631151

Footnotes

1 O'Hagan also contested FCS's security interest in crop accounts held by a third party, which is not relevant to this appeal.

2 RCW 6.32.270 provides:

> In any supplemental proceeding, where it appears to the court that a judgment debtor may have an interest in or title to any real property, and such interest or title is disclaimed by the judgment debtor or disputed by another person, or it appears that the judgment debtor may own or have a right of possession to any personal property, and such ownership or right of possession is substantially disputed by another person, the court may, if the person or persons claiming adversely be a party to the proceeding, adjudicate the respective interests of the parties in such real or personal property, and may determine such property to be wholly or in part the property of the judgment debtor. If the person claiming adversely to the judgment debtor be not a party to the proceeding, the court shall by show cause order or otherwise cause such person to be brought in and made a party thereto....

3 The memorandum opinion directs FCS to prepare an order consistent with its holding, but no such order appears in the record.

4 RCW 6.13.110, entitled "Application under RCW 6.13. 100 must be made by verified petition ...." sets standards for a petition that must be filed when attempting to execute a judgment against a homestead in certain cases.

5 These statutes set forth the rules and procedures for executing a judgment against a homestead.

6 FCS seeks relief from the order denying writ of execution, from the memorandum opinion and from the supplemental order. FCS did not, however, designate the memorandum opinion or supplemental order in its notice of appeal. Because the order appealed cannot be decided without considering the merits of the previous two orders, we review all three orders. *See Right–Price Recreation, L.L.C. v. Connells Prairie Cmty. Council,* 105 Wash.App. 813, 819, 21 P.3d 1157 (2001); RAP 2.4(b).

HAGEN BATES AND EDWARDS P.S.

December 20, 2016 - 2:37 PM

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